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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

UNITED STATES OF AMERICA,
Petitioner,
vs.
STATE OF COLORADO AND COLORADO DEPARTMENT OF HEALTH,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS STATE OF COLORADO AND COLORADO DEPARTMENT OF HEALTH TO THE UNITED STATES' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Colorado issued a compliance order to correct the Army's mismanagement of hazardous waste at the Basin F area of the Rocky Mountain Arsenal. The question presented is whether the Army's initiation of CERCLA activities bars the State from enforcing its EPA-authorized RCRA hazardous waste management authority, including inspections, monitoring, and emergency response requirements.

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STATUTORY PROVISIONS INVOLVED

Section 114(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601-9675, provides:

> (a) **Additional State liability or requirements with respect to release of substances within State.**
>
> Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

42 U.S.C. § 9614(a).

Section 120(i) of CERCLA provides:

> **(i) Obligations under Solid Waste Disposal Act**
>
> Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act (including corrective action requirements).

42 U.S.C. § 9620(i).

Section 302(d) of CERCLA provides in relevant part:

> (d) Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.

42 U.S.C. § 9652(d).

Other related CERCLA provisions are reproduced in the appendix to this brief in opposition, as are relevant portions of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987.

STATEMENT OF THE CASE

To meet the burgeoning task of managing and cleaning up toxic waste facilities that pose threats to public health and the environment, Congress has legislated a comprehensive enforcement

scheme of compatible laws that give both the federal and state governments active roles. Central to this scheme are the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 ("RCRA"), and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 ("CERCLA"). RCRA sets up a management program to deal with hazardous materials from initial generation through treatment, storage, and final disposal.[1] The United States Environmental Protection Agency ("EPA") may authorize states to "carry out" their own hazardous waste programs "in lieu of" the federal RCRA. 42 U.S.C. § 6926(b).[2] As the court of appeals explained, RCRA establishes a prospective cradle-to-grave regulatory program for hazardous waste generated, treated or stored after 1980. Petitioner's Appendix ("Pet. App.") at 5a. CERCLA, on the other hand, contains no substantive requirements or standards for the daily operation and management of hazardous waste sites; it is a remedial statute designed for responding to and financing the actual cleanup of contaminated sites. Pet. App. at 6a-7a.

The present case arises out of Colorado's efforts to exercise its federally-authorized role in the management and cleanup of hazardous wastes at the Rocky Mountain Arsenal located northeast of Denver, Colorado. The Arsenal is a 27-square mile, federally-owned facility which has been operated by the United States Army since 1942. For most of the intervening 50 years, the Army generated, treated, stored and disposed of hazardous materials at the Arsenal, such as pesticides, nerve gas and byproducts of its chemical warfare

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[1] RCRA also provides for corrective action where treatment, storage or disposal units have leaked, releasing hazardous wastes into the environment. 42 U.S.C. § 6924 (u), (v) (RCRA § 3004 (u), (v)), 42 U.S.C. § 6928 (h) (RCRA § 3008 (h)). *See* App. *infra* pp. A-1 to A-3.

[2] Colorado's program, the Colorado Hazardous Waste Management Act, Colo. Rev. Stat. §§ 25-15-301 - 313 (1989) ("CHWMA"), was authorized in 1984. 49 Fed. Reg. 41,036 (Oct. 19, 1984).

manufacturing activities. Since 1989, the sole mission of the Army at the Arsenal has been site cleanup.

The crux of the present litigation is not who has authority to determine the appropriate remedy for the entire Arsenal, as the United States claims (United States' Petition ["Pet."] at 11), but rather the proper management of huge quantities of liquid and solid hazardous wastes from the 92.7 acre waste pond within the Arsenal known as Basin F. *See* Pet. App. at 3a. This is a critical distinction. RCRA regulation of on-going hazardous waste management activities requires compliance with protective procedures not contemplated by the CERCLA process. For example, unlike RCRA, CERCLA does not address the need for routine inspections of equipment and waste storage units to ensure their physical integrity. *See* ARARs discussion *infra* p. 21. Thus, RCRA fills a regulatory void in the CERCLA process for the day-to-day management of hazardous wastes and the units in which they are stored, treated or disposed.[3]

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[3] The Basin F experience demonstrates the unique and necessary role RCRA plays in the management of hazardous wastes at CERCLA sites. In closing Basin F to eliminate the source of extensive groundwater contamination, liquid and solid hazardous wastes were removed and placed into newly constructed storage units pending ultimate treatment. These storage units (3 tanks, 2 ponds, and a waste pile) still store Basin F wastes today, and are typical of the type of facility regulated by RCRA. Colorado's Final Amended Compliance Order ("FACO") reveals that the CERCLA process, as employed by the Army, failed to address routine management of these units once constructed. Thus, leaks in two tanks and breached primary liners in the ponds and wastepile went undetected until after the State conducted its RCRA inspections. *See* FACO paras. 16, 123-24, 133, 173-194, Pet. App. at 62a, 82a, 83a, 94a-97a. Those inspections discovered the Army's lack of routine recordkeeping and inspection procedures ordinarily designed to monitor the integrity of storage units. *Id.* at paras. 120-134, 223-228, Pet. App. at 82a-84a, 103a. Such procedures are fundamental requirements of RCRA. The conditions found by the State in its inspections underscores the need for these requirements to protect the health and environment of the citizens of Colorado.

The facts of this case are not as presented by the United States in its petition. The State will attempt to correct the misstatements of fact below.[4]

The Army initially conceded that RCRA applies to Basin F. At the time CERCLA was enacted in December, 1980, the Army admitted that RCRA properly applied to portions of the Arsenal, including Basin F. The Army accordingly submitted the required RCRA Part A permit application to EPA in November, 1980.[5] The Part A application identified Basin F as a hazardous waste surface impoundment subject to RCRA regulation. In 1982, the Army entered into a Memorandum of Agreement with the State of Colorado, the EPA, and Shell Oil Company,[6] which recognized Basin F as a RCRA hazardous waste storage facility, and by which the Army agreed to conduct closure and post-closure operations at the basin pursuant to RCRA and "applicable State requirements." In 1983, the Army submitted to EPA a revised RCRA Part A application and a detailed Part B application, which included a RCRA closure plan for Basin F. After review, both the EPA and the Colorado Department of Health ("CDH") declared the closure plan deficient. In May 1984, the EPA issued a Notice of Deficiency to the Army for its entire Part B RCRA application, which included requirements for several of the Arsenal's RCRA units and, notably, Basin F.

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[4] "[T]he brief in opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." Sup. Ct. R. 15.1.

[5] RCRA provides a two-step permit application process, the steps of which are commonly referred to as Part A and Part B. *See* Pet. App. at 8a, n.7.

[6] Shell Oil Company is the other Arsenal polluter, having caused widespread contamination with its pesticide manufacturing conducted over the course of approximately 30 years.

In November 1984, the EPA authorized Colorado to administer and enforce the Colorado Hazardous Waste Management Act ("CHWMA") "in lieu of" the federal RCRA program. *See supra* note 2. That month, the Army submitted its Part B application to CDH. Just as EPA had done, CDH requested the Army revise the Basin F closure plan. Despite the United States' current claims to the contrary (*see*, *e.g.*, Pet. at 11), the Army persevered in its attempts to address Basin F under the aegis of the State's CHWMA program by submitting a new Basin F closure plan to CDH in December 1985.

CDH found the new closure plan inadequate, and issued its own draft partial closure plan for public comment in May 1986. Pursuant to CHWMA, the Army participated in the June 1986 public meeting on the State's draft plan, and later provided lengthy comments on the plan. On October 1, 1986, Colorado issued its final Modified Basin F Closure Plan, which incorporated most of the Army's comments. One year later, the Army abruptly reversed its position on the applicability of RCRA, and informed Colorado that it intended to clean up Basin F solely pursuant to CERCLA.

Thus, while the United States alleges that it began a CERCLA remedial investigation and feasibility study in October 1984 (Pet. at 11), it was not until October 1987, three months after most of the Arsenal was listed on the CERCLA National Priorities List ("NPL"),[7] that the Army notified the State that it was withdrawing

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[7] The Arsenal was listed on the NPL on July 11, 1987. 52 Fed. Reg. 27619. Basin F was excluded from that listing because EPA believed that it would be cleaned up pursuant to RCRA/CHWMA. 54 Fed. Reg. 10512, 10515-16 (Mar. 13, 1989). Basin F itself was not listed on the NPL until March 13, 1989 (*id.*), exactly 17 days after a federal district court opinion in the State's underlying enforcement case held that CERCLA section 120(a) clearly preserves State authorities at federal facilities not on the NPL. *State of Colorado v. United States Dep't of the Army*, 707 F. Supp. 1569 (D.Colo. 1989) (App. *infra* p. B-1). Interestingly, on the very same day that Basin F was listed, the United States moved the district court for reconsideration of its opinion based on the fact that Basin F was listed.

its RCRA Part B application for the Arsenal's RCRA units. Therefore, though the United States has relied on revisionist history throughout this litigation, the record shows that the Army recognized the application of RCRA/CHWMA to Basin F closure until October 1987.[8] As the court of appeals found, the Army responded to the State's Basin F closure plan by suddenly questioning the State's RCRA jurisdiction. Pet. App. at 10a. Thus began the jurisdictional confrontation that has culminated in the case now before the Court.

The Final Amended Compliance Order ("FACO"), the subject of the immediate lawsuit, resulted from Colorado's attempts to exercise its EPA-authorized RCRA authority following the federal district court's February 1989 decision. *State of Colorado v. United States Dep't of the Army*, App. *infra* pp. B-1 to B-21. Having had its independent authority recognized by the district court, the State reinspected Basin F and issued the FACO to address the CHWMA violations discovered there. CDH issued the FACO to the Army in September 1989. At that time, the Army was in the final stages of the first of two CERCLA interim response actions ("IRAs") to deal with liquid hazardous wastes stored at Basin F. The FACO does not, as alleged by the United States (*see, e.g.*, Pet. at 4), seek to "assert direct control over cleanup of the site, independently of CERCLA, by issuing an administrative compliance order dictating response activities under [CHWMA]." Nor does it require the Army to obtain permits for activities at Basin F, as the United States disingenuously implies.[9] Pet. at 24. The compliance order merely seeks to assert

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[8] Notably, during this same period, the Army continued to recognize CHWMA at other Arsenal RCRA facilities. For example, the Salts Storage Container Facility, which stored upwards of 76,000 drums of waste from nerve gas incineration, was closed on October 15, 1986 pursuant to a CDH-amended closure plan.

[9] The FACO does require the Army to update the information contained in its existing RCRA permit applications. These applications are the means by which the State gains information from any RCRA interim status facility necessary to ensure the safe management of hazardous wastes. *See* Pet.

some authority over the ongoing treatment, storage and disposal of hazardous wastes at the Arsenal. It does this by requiring the Army to submit an amended Basin F closure plan, and update the existing Part A application to reflect the newly constructed units that are storing Basin F wastes, or that will treat or dispose of such wastes. It also requires that certain plans and schedules addressing soil contamination, monitoring, and groundwater contamination be submitted to CDH as required by CHWMA. Pet. App. at 14a. Lastly, the compliance order noted 42 separate violations of the CHWMA, including failure to adequately inspect the Basin F hazardous waste storage tanks, ponds and waste pile for deterioration, and failure to report or properly respond to the leaking tanks used to store liquids removed from Basin F. CDH's order also cited the Army for failing to maintain operating and maintenance records and emergency response plans necessary for compliance with CHWMA.

The United States' charge that the interim action at Basin F "has been impeded by Colorado's refusal to channel its input through CERCLA's ARARs process" (Pet. at 18) totally misrepresents the facts. As the court of appeals found, the State never impeded, nor attempted to impede, cleanup at the basin. Pet. App. at 21a.

The United States asserts that when the Army "requested" Colorado to identify ARARs for the excavation IRA, the State did not respond. Pet. at 12. This claim is patently false. By letter received August 24, 1987, the Army notified Colorado that written identification of ARARs were due by 5 p.m. August 28, 1987. In the limited time allotted, Colorado was only able to submit a letter that identified RCRA/CHWMA as Basin F ARARs, and contained specific technical guidance documents pertaining to the siting of hazardous waste disposal facilities, and to methods for review of such sites. Also attached was a complete Arsenal-wide ARARs identification that the State had previously submitted, and that pertained to individual

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App. at 35a.

sites such as Basin F. Additionally, Colorado commented on the Army's Preliminary Draft Basin F IRA ARARs document on November 19, 1987.

The United States' implication that Colorado has opted out of the entire CERCLA process at the Arsenal is equally unfounded. *See, e.g.*, Pet. at 19-21, 25-26. In fact, the State has drafted and submitted to both the Army and EPA well over 12,000 pages of formal comments pursuant to the CERCLA process. These legal and technical comments are part of the official administrative record, and pertain to all aspects of the CERCLA remedial investigation and feasibility study ("RI/FS"), including each of the dozen or more interim response actions at the Arsenal. State comments cover everything from ARARs identification to analysis of alternatives, risk characterizations, proposed plans, and final decision and implementation documents. Furthermore, CDH employs several full time professional staff working on CERCLA aspects of the Arsenal; the State also retains outside experts in hydrogeology, human and environmental toxicology, and biostatistics to review and comment on Army proposals. The United States is acutely aware of this; in fact, it has reimbursed the State for the Army's share of $2 million in CERCLA response costs incurred by the State prior to 1989.[10] Since then, Colorado has expended considerable additional funds--well over $4 million--to participate as fully as the Army allows it to in the CERCLA RI/FS process for the entire Arsenal.

The problem is not the State's alleged unwillingness to participate. Rather, it is the Army's efforts to shut the State out by disregarding the State's input into the CERCLA process, and its noncompliance with State law. If the State had as much impact on the CERCLA process as the United States suggests (Pet. at 22), it would not need to bother with enforcement orders to assure

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[10] These response costs *exclude* any expenditures the State incurred in attempting to enforce compliance with CHWMA.

compliance with State law.

REASONS WHY THE PETITION SHOULD BE DENIED

By misrepresenting the facts, the United States depicts the legal issues as far more confrontational than they are in reality. The United States implies that if its petition is granted, the Court will have before it a situation where the State is dictating an inconsistent cleanup remedy and refusing to participate at all in the Army's CERCLA process. *See* Pet. at 17. Much as these fabricated circumstances would make for a compelling controversy requiring resolution by this Court, these are not the facts of this case. Should the Court determine to review this case, it will not have facts before it from which to decide a direct conflict between state and federal law, nor will it confront a reticent State lying in wait as the Army selects its CERCLA remedy.[11] Furthermore, as discussed in detail below, the United States' legal arguments fall short of meeting the standard required to warrant this Court's review. There is no important conflict regarding federal law in this case, and no split exists between the circuits.

I. A UNANIMOUS COURT OF APPEALS CORRECTLY GAVE EFFECT TO EACH PROVISION OF CERCLA AND RCRA. THUS, THERE IS NO CONFLICT REGARDING FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT.

The court of appeals accurately portrays the State's assertion

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[11] "Unless [the brief in opposition addresses Petitioner's misstatements of fact or law], the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon full consideration ... that such is not the case." Sup Ct. R. 15.1. *See supra* note 4.

of its RCRA authority at the Arsenal as a congressionally approved "attempt to enforce requirements of its federally authorized hazardous waste laws and regulations, consistent with its ongoing duty to protect the health and environment of its citizens." Pet. App. at 27a. The disagreement which lies at the heart of this litigation is not so much between the United States and Colorado as it is between the Army (and other federal polluters) and Congress. The Army is clearly unhappy with Congress over its choice to preserve, in CERCLA, the states' independent RCRA authority at federal facility CERCLA sites.

The United States' invocation of public policy arguments opposing CERCLA's preservation of state RCRA authority notwithstanding, the court of appeals' decision in this case does not raise important issues demanding this Court's review. State participation or control has become commonplace in environmental legislation. "One of the hallmarks of the environmental legislation passed by Congress in the 1970's was its increased reliance on a regulatory framework that has come to be known as cooperative federalism."[12] In its decision, the court of appeals merely acknowledges the cooperative federalism Congress preserved in enacting CERCLA. *See* 42 U.S.C. §§ 9606(a), 9614(a), 9620(i) and 9652(d).

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[12] Mark Squillace, *Cooperative Federalism Under the Surface Mining Control and Reclamation Act: Is This Any Way to Run a Government?*, 15 Env. Law Rptr. 10039, 10039 (Feb. 1985). This Court has recently cited as examples of Congress' scheme of cooperative federalism RCRA, the Clean Water Act, and the Occupational Safety and Health Act. *New York v. United States*, 112 S. Ct. 2408, 2424 (1992).

A. Congress Crafted RCRA and CERCLA to Work Together as a Comprehensive Regulatory Scheme to Address the Hazardous Waste Crisis.

RCRA is designed to provide detailed standards and requirements for the management of hazardous wastes from generation to permanent disposal. In RCRA, Congress encouraged EPA to authorize states to "carry out" their own hazardous waste programs "in lieu of" RCRA. Thus, Congress provided that state enforcement of EPA-authorized State hazardous waste management laws has "the same force and effect as action taken by [EPA]." 42 U.S.C. § 6926 (b), (d).

Congress supplemented existing hazardous waste law with CERCLA in an attempt to ensure the prompt cleanup of the thousands of polluted sites around the country. Congress attempted to achieve this massive cleanup goal by setting up a joint RCRA/CERCLA regulatory scheme that expressly preserves the ability of states to enforce their own hazardous waste laws at sites also addressed by CERCLA. In order to ensure that federal polluters were accountable to the states, Congress further provided an explicit waiver of the federal government's sovereign immunity in RCRA section 6001 (42 U.S.C. § 6961, App. *infra* p. A-4) and, in CERCLA section 120(i) (42 U.S.C. § 9620(i)), provided that nothing in CERCLA was to affect a federal facility's obligation to comply with a state's EPA-authorized RCRA program.[13]

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[13] In submitting the conference report for the Superfund Amendments and Reauthorization Act of 1986 ("SARA") to the Senate, Senator Dole described the proposed section 120, regarding federal facility compliance, as "clarifying" that CERCLA and RCRA require federal facilities to comply with all federal and state laws:

> This section [RCRA section 6001], together with section

> 120 of CERCLA, can leave no doubt that Federal facilities are subject to State laws, including State fees and penalties ... Thus, Federal facilities are subject to all State administrative and court procedures and sanctions, including penalties and injunctions. I am pleased the conferees chose to clarify these points. It is essential that the Government elected by the people to protect them not to [sic] be excused from protecting the public health under a Federal statute such as Superfund [CERCLA]. Such double standards are anathema to those of us who believe that the Federal Government's primary task is to protect the public, not to contaminate it.

132 Cong. Rec. S14895 (daily ed. Oct. 3, 1986). Another of the conference report's principal authors also noted past problems with federal polluters circumventing state and federal environmental laws: "[N]o loophole, it seems, is too small to be found by the Federal Government." *Id.* at S14903 (remarks of Sen. Stafford).

The attitude of being above the law repeatedly expressed by federal polluters led a frustrated Congress to pass the Federal Facilities Compliance Act of 1992, P.L. 102-386, 106 Stat. 1505 (Oct. 6, 1992). This Act amends RCRA to clarify that States may assess penalties against the federal government for RCRA violations. The committee report accompanying the House version of the bill related that "federal facilities present some of the very worst [RCRA] compliance problems" and that "[s]ignificant noncompliance by DOD facilities involving violations of [RCRA requirements] continue[s] to be reported" by state and federal oversight agencies. H.R. Rep. No. 141, 101st Cong., 1st Sess. 3 (1989). During floor debates on the conference bill, Congressman Dingell, a member of the conference committee, stated that:

> The bill is designed to ensure that authority to enforce Federal facilities' compliance with State or Federal hazardous waste provision [sic] accompanies the responsibility for administering those provisions. In almost every case this means the States, *which is entirely consistent with the underlying intent expressed by Congress in RCRA that the States be the primary implementers of this country's hazardous waste laws.*

Congress' preservation of state authority is especially important at federal facility sites, such as the Rocky Mountain Arsenal, where the extent of cleanup is being determined by the federal polluter. At federal facilities, EPA is severely constrained by the requirement that the "federal family" speak with one voice.[14] The lower courts both recognized that the relationship between EPA and the Army prevents EPA's monitoring of the CERCLA cleanup from serving as "an effective check on the Army's efforts." Pet. App. at 13a. *See also* App. *infra* pp. B-16 to B-18. The court of appeals correctly held that independent state authority is not only necessary, but congressionally mandated, to provide an effective process for achieving federal facility cleanups.

In spite of the clear limitation on EPA's oversight at federal facilities, the United States contends that a state's only role in protecting its citizens from federally-created contamination is simply to comment on the federal polluters' cleanup decisions. This interpretation provides little comfort to a state or its citizens.

The United States interprets CERCLA as nullifying the State's

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138 Cong. Rec. H9136-37 (daily ed. Sept. 23, 1992) (emphasis added).

[14] EPA recognizes its enforcement limitations at federal facilities:

> States are not subject to the same constraints as EPA regarding enforcement actions against Federal facilities. As a result, States generally may exercise a broader range of authorities and enforcement tools than EPA to address violations at Federal facilities. *States should use the full range of their enforcement authorities to address Federal facility violations to the same extent they are used for non-federal facilities* while meeting the requirements of timely and appropriate enforcement response.

EPA, Federal Facility Compliance Strategy, at VII-1 (November 1988) (emphasis added).

independent authority to apply and enforce any State environmental laws, including CHWMA, at the Arsenal from the time the RI/FS was initiated until after the final remedial action is implemented. The United States alleges that the RI/FS commenced in 1984. The final remedial action is currently projected to be selected in 1995, and implementation will consume at least an additional ten years. The United States argues that CERCLA precludes State authority over hazardous waste management at the Arsenal for the intervening 20-plus years. The court of appeals correctly rejected this argument that CERCLA abrogates Colorado's authority to protect the health and environment of its citizens pursuant to its federally-authorized hazardous waste management program.

Protecting its citizens from the potentially adverse effects resulting from the mismanagement of hazardous wastes, especially during protracted CERCLA remedial activities, is a real concern for the states. For example, during the Army's interim remediation efforts at Basin F, noxious emissions detected two to three miles from the Arsenal boundary caused Arsenal neighbors and workers to repeatedly experience adverse health effects, including headaches, respiratory problems, and rashes. *See* Pet. App. at 12a, n.11. Due to the Army's refusal to recognize the State's RCRA authority, the State was powerless to protect its citizens, short of evacuating the surrounding neighborhoods.

The policy disagreement expressed in the United States' petition is not an issue of "immense practical importance" (Pet. at 17) because CERCLA and RCRA authorities have been successfully melded at other federal facility sites. For example, at the Department of Energy's Hanford and Rocky Flats sites, state RCRA authority and federal CERCLA authority co-exist to address hazardous waste management and contaminant cleanup. Indeed, EPA has recognized the importance of the congressionally mandated CERCLA/RCRA/state law interface in its listing policy. In that policy, EPA states that the

> potential overlap between RCRA and CERCLA cleanup authorities is the result of Congressional design not site listings.
>
> * * * * *
>
> How RCRA authorities are affected (if at all) when CERCLA also applies to a site is a matter that varies greatly depending upon the facts of the site. In some cases, the NPL site is physically distinct from the RCRA-regulated hazardous waste management units, and corrective action or closure at the regulated units may proceed under RCRA, while at the same time a cleanup action is proceeding at another area of the property under CERCLA, without the risk of inconsistency or duplication of response action. In other cases, the releases or contaminant plumes may overlap, such that a comprehensive solution under one statute may be the most efficient and desirable solution. The questions of which authority should control, and of how to avoid potential duplication or inconsistency, are often implementation issues to be resolved in light of the facts of the case and after consultation between EPA and the concerned State.

54 Fed. Reg. 10,522-23 (1989).

In support of its assertion that the appellate court's decision raises important issues, the United States paints a harrowing picture of states ignoring the CERCLA process,[15] coming in at the last

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[15] The United States alleges that the State refused to cooperate with the CERCLA efforts. Pet. at 12, 18. This is not the case, as discussed *supra* pp. 8-9. Moreover, in 1990 the Army, EPA, the State, and Shell Oil Company (the Arsenal's other polluter) entered into an agreement recognizing and setting out the oversight roles of the State and EPA at the

minute to sabotage EPA's dutiful efforts and wreak general havoc.[16] Such unbridled speculation is unsupported and unreasonable.[17]

Given the current fiscal realities, it will always be desirable, if not necessary, to avoid duplicative cleanup efforts. The United States can be expected to defer to state-initiated cleanups with increasing frequency. *See, e.g., infra* note 27. Moreover, states can be expected to exercise their independent enforcement authorities at CERCLA sites only in cases where sufficient state involvement is not allowed, or at facilities which routinely violate state laws requiring

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site's incinerator, constructed to burn Basin F liquid wastes. Tough public opposition to the incinerator made State support critical to community acceptance of the project. The success of this project demonstrates the State's cooperative participation in the Arsenal's CERCLA process when given the opportunity.

[16] A scenario equally harrowing to that painted by the United States would be likely under its proffered interpretation of CERCLA. States would be relegated to the unenviable position of begging and cajoling federal authorities to comply with state law. The federal government, pressured to move forward with the cleanup, and at federal facilities to preserve resources, gives short shrift to the states' views and proceeds with an unacceptable response action. The states' only remedy at such point would be to wait until completion of the remedy and then sue under CERCLA to undo the work that had already transpired, resulting in delay to ultimate cleanup and gross waste of resources by all parties. Congress surely envisioned neither scenario. Rather, it intended that state and federal governments work together to achieve the common goal of cleanup.

[17] In fact, the Army's actions immediately following the denial of its petition for rehearing on June 30, 1993, belie its arguments that chaos will result unless the court of appeals decision recognizing state authority is overturned. The Army approached the State to request to enter into a CHWMA compliance order on consent to set out a schedule for demonstrating CHWMA compliance at the incinerator which treats Basin F liquids and the related Basin F ponds and tanks. Agreement on the compliance order was quickly reached, so that the order was signed on August 6, 1993. (In the order, the United States reserved all its rights to proceed with the present appeal.)

responsible management of hazardous wastes during the lengthy CERCLA process. The preservation of state authority, however, ensures that the states' efforts to protect their citizens and the environment are taken seriously by the United States, an important goal recognized by Congress and reflected in the several provisions of CERCLA discussed below.

B. The Petition Does Not Present an Adequate Legal Question Warranting Review by the Court.

Like its policy arguments, the United States' legal argument that there is a conflict of laws, or an otherwise important federal question, fails to justify review. Congress expressly preserved independent state authority in CERCLA. The United States' arguments to the contrary are without merit. Colorado's exercise of its RCRA authority does not "challenge" any CERCLA remedy, and is not precluded by CERCLA section 122(e)(6).

1. *Day-to-day Management of Hazardous Wastes Under CHWMA is Expressly Preserved Despite the Designation of the Arsenal as a CERCLA Site.*

CERCLA is clear on its face. No fewer than four provisions unequivocally preserve the application of state environmental laws at contaminated sites, like the Arsenal, regardless of whether those sites are also subject to CERCLA. 42 U.S.C. §§ 9606(a), 9614(a), 9620(i) and 9652(d).

Congress explicitly preserved the states' authority to regulate hazardous substances under state law, independent of CERCLA, through the following language in CERCLA section 114(a), entitled "Relationship to other law:"

Nothing in this chapter [CERCLA] shall be construed

> or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

42 U.S.C. § 9614(a).

In the CERCLA section dealing with "savings provisions," Congress clarified that:

> Nothing in this chapter [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.

42 U.S.C. § 9652(d) (CERCLA section 302(d)).

And again, under CERCLA section 106(a), Congress emphasized that CERCLA cleanup authorities were to be exercised "*[i]n addition to any other action taken by a State* or local government." 42 U.S.C. § 9606(a) (App. *infra* p. A-1) (emphasis added). Thus, the express language of CERCLA confirms that Congress intended to supplement existing environmental law with CERCLA authorities, not supersede it. Taken together, the "savings clauses" of CERCLA sections 114(a), 302(d) and 106(a) leave no doubt as to Congress' intent to protect states' authority to enforce their environmental laws at CERCLA sites.

The United States argues that the CERCLA section 121 ARARs scheme, enacted in the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), has superseded the earlier enacted savings clauses (Pet. at 24-25). However, the United States conveniently ignores another key provision, enacted along with the ARARs section, which unequivocally reaffirms congressional intent to preserve existing state authorities. In the "Federal Facilities"

section of SARA, Congress provides that:

> Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with *any* requirement of the Solid Waste Disposal Act [RCRA] (*including corrective action requirements*).

42 U.S.C. § 9620(i) (CERCLA section 120(i)) (emphasis added). Thus, Congress never intended state RCRA programs to be limited by CERCLA. As Senator Mitchell, one of the SARA conferees, explained:

> Section 6001 of [RCRA] clearly states that federal agencies are to be "subject to, and comply with, all Federal, State, interstate, and local requirements, both substance and procedural." This section, together with section 120 of CERCLA, can leave no doubt that Federal facilities are subject to State laws, including State fees and penalties.

132 Cong. Rec. S14918 (daily ed. Oct. 3, 1986).

In enacting SARA Congress could easily have repealed the savings clauses of sections 114(a), 302(d) and 106(a), yet it chose to retain them. The United States' suggestion that these provisions merely refer to the ARARs process (Pet. at 24-25) is illogical considering that all of these provisions were enacted years before the ARARs scheme ever existed.[18]

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[18] The United States is also wrong in its assertion that recognizing independent state authority makes the CERCLA ARARs process "a dead letter" (Pet. at 25). CERCLA applies to a wide variety of sites, including sites where RCRA jurisdiction does not exist; e.g., sites where the contaminants released do not meet the definition of "hazardous wastes" subject to RCRA. Also, as the court of appeals noted, the ARARs scheme

The present litigation questions the authority of the State to require the management and closure of a hazardous waste disposal facility (Basin F) in a manner that is protective of human health and the environment as required by state and federal hazardous waste laws. Congress' mandate in section 120(i) that the United States continue to comply with state RCRA programs preserves this authority. The ARARs process is not sufficient to ensure responsible management. For example, most, if not all, of the monitoring, inspection, and reporting requirements of CHWMA are *not* considered to be ARARs by the United States, because EPA does not recognize "procedural" requirements as state standards which the remedy must attain pursuant to CERCLA section 121(d)(2).[19] Yet these requirements are the means by which the State ensures the safe management of hazardous waste.[20]

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is particularly valuable for states which either do not have their own hazardous waste programs or choose not to exercise their independent enforcement authority, because it ensures that at least some of RCRA's requirements are met at CERCLA sites. Pet. App. at 34a.

[19] The United States mischaracterizes the role of the states in the CERCLA process. The ARARs process does not provide the states a "full opportunity to participate" (Pet. at 22) because state identified ARARs may be ignored or waived. In fact, the Army is currently denying that Colorado's Basic Standards for Groundwater are ARARs for its groundwater cleanup offsite.

[20] These are the types of requirements Colorado attempts to enforce with the FACO. The State's intent is to protect the health and environment of its citizens from the hazards of cleanup activities. Indeed, the violations discussed by the United States in note 6 of its petition, such as the unreported leaking tanks and breached liners, point to the need for state oversight of ongoing hazardous waste management at the Arsenal. *See supra* note 3.

2. *The United States' Arguments that CERCLA does not Preserve State Authority are Misplaced.*

a. Colorado's Exercise of Independent Authority is not a "Challenge" Prohibited by CERCLA Section 113(h).

The court of appeals properly determined that CERCLA section 113(h) does not apply in the present case. Section 113(h) denies federal court jurisdiction, with a few exceptions, to review challenges to CERCLA removal or remedial actions. As the court of appeals noted, section 113(h)

> does not bar federal courts from reviewing a CERCLA response action prior to its completion; rather, it bars federal courts from reviewing any "challenges" to a CERCLA response action. This is a critical distinction because an action by Colorado to enforce the final amended compliance order, issued pursuant to its EPA-delegated RCRA authority, is not a "challenge" to the Army's CERCLA response action. *To hold otherwise would require us to ignore the plain language and structure of both CERCLA and RCRA, and to find that CERCLA implicitly repealed RCRA's enforcement provisions contrary to Congress' expressed intention.*

Pet. App. at 19a (emphasis added). *See also* Pet. App. at 27a-28a.

Congress never contemplated that section 113(h) would preclude a state from enforcing its own hazardous waste laws and regulations. Section 113(h) was enacted to "prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing EPA's cleanup activities." H.R. Rep. No. 253, 99th Cong., 2d Sess. 266 (1985). Colorado's

independent and complementary RCRA regulatory scheme is not intended to, nor will it, slow down or prevent CERCLA cleanup activities.

The United States' interpretation of section 113(h) would preclude Colorado from acting to protect the health, welfare, and environment of its citizens from the time a CERCLA investigation begins until cleanup is completed. As discussed *supra* p. 15, the Arsenal's CERCLA cleanup is expected to take decades to complete. Congress clearly did not intend, nor did it provide, that owners and operators of hazardous waste facilities could simply cease compliance with state hazardous waste management laws for extended periods of time. *See, e.g.*, CERCLA § 120(i) (42 U.S.C. § 9620(i)).

Furthermore, review by this Court of the United States' primary argument, that CERCLA section 113(h) precludes federal court jurisdiction, is unnecessary because the unique procedural history of this case is unlikely to be repeated. The State filed its original CHWMA enforcement action in state court. *See* Pet. App. at 10a. The United States successfully removed the state case to federal district court pursuant to 28 U.S.C. § 1442(a)(1).[21] This Court has since determined that such removal is improper. *Primate Protection League v. Tulane Education Fund*, 111 S. Ct. 1700, 1705 (1991). Thus, future cases involving state law claims, such as those alleged in the FACO, will most certainly be decided by state courts.

[21] Ironically, after removing the state law case to federal court, the United States argued that the federal court lacked jurisdiction to address the state law claims.

b. CERCLA Section 122(e)(6) does not Prohibit Colorado from Independently Enforcing its Hazardous Waste Laws.

Under a section governing EPA's settlements with *private* polluters, CERCLA contains a provision which precludes private parties from undertaking any remedial action not pre-approved by EPA. The United States argues that the "common sense import of Section 122(e)(6)" is that it precludes independent state enforcement unless specifically authorized by EPA. Pet. at 25-26. The court of appeals rightfully rejected this argument by properly reconciling section 122(e)(6) with the savings clauses and other provisions of CERCLA, easily concluding that the purpose of section 122(e)(6) was to prevent ill-advised actions by responsible parties from interfering with EPA's ultimate cleanup plans. Pet. App. at 36a-39a. This interpretation is supported by the EPA's listing policy, on which the United States so heavily relies (Pet. at 26):

> [CERCLA section 122(e)(6)'s] authorization mechanism would not affect normal hazardous waste management requirements under RCRA, such as complying with manifest, 90-day storage, and labeling requirements; *any RCRA-regulated hazardous waste management units operating at a CERCLA site must continue to comply with RCRA hazardous waste management requirements, even if a CERCLA response action is underway.*

54 Fed. Reg. 10523 (1989) (emphasis added). Thus, it is the United States, not the court of appeals, which fails to give meaning to every provision of CERCLA.

II. THERE IS NO SPLIT IN THE CIRCUITS AND NO OTHER CIRCUIT HAS ADDRESSED THE ISSUE WHICH WAS BEFORE THE TENTH CIRCUIT.

The United States' attempt to portray a split in the circuits on the issue of independent state authority is deceptive. Not one of the three cases cited by the United States addresses the issue before the Tenth Circuit, nor has any other court of appeals faced the question of the interaction of concurrent RCRA and CERCLA authority at federal facility cleanup sites.[22]

The United States cites to *Boarhead Corp. v. Erickson*[23] and *Schalk v. Reilly*[24] as conflicting decisions, but fails to explain the relevance of these CERCLA suits by private citizens and a potentially responsible party which attempted to halt implementation of CERCLA selected remedies at private party sites. The court of appeals noted that, unlike the present case, both *Boarhead* and *Schalk* involved private party challenges to CERCLA remedial actions clearly proscribed by CERCLA section 113(h). Pet. App. at 22a-24a. In contrast, this case involves the state asserting its EPA-authorized RCRA authority to oversee the management of hazardous wastes where a CERCLA remedy has yet to be selected. This question was not before, nor addressed by, the Seventh or the Third Circuits.

In the case upon which the United States relies most, *United States v. Akzo Coatings*,[25] the Sixth Circuit expressly held that the

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[22] Thus, no other court has had to interpret CERCLA section 120(i), which expressly preserves RCRA/CHWMA authorities at federal facilities.

[23] 923 F.2d 1011 (3d Cir. 1991).

[24] 900 F.2d 1091 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990).

[25] 949 F.2d 1409 (6th Cir. 1991).

terms of a court-entered consent decree, "and not the language of CERCLA," preempted an alternative state remedy. 949 F.2d at 1455. Thus, *Akzo* is also irrelevant to the issues raised in the present case. Moreover, the Sixth Circuit faced facts very different from those before the Tenth Circuit. In *Akzo*, the EPA had selected a CERCLA remedy, entered into a settlement with the responsible party, and lodged a consent decree with the court. The State of Michigan challenged EPA's selected CERCLA remedy by advancing an inconsistent alternative remedy: i.e., excavation and incineration as compared to the EPA's soil washing remedy -- compliance with both of which would be physically impossible. The Sixth Circuit limited its holding to a recognition that CERCLA proscribes state "interference with the proper implementation of the [consent] decree" once entered.[26] *Id.* at 1458.

In contrast, the present case involves Colorado's enforcement of its environmental laws to ensure that the day-to-day management of hazardous wastes at the Arsenal are conducted in a manner protective of human health and the environment. There is no final selected remedy at the Arsenal, and the State is not attempting to propose an alternative remedy -- inconsistent or not. As the court of appeals wisely concluded, "[u]nlike the state in *Akzo Coatings*, Colorado is asserting its independent EPA-authorized RCRA authority rather than challenging the selection of a CERCLA remedy." Pet. App. at 34a, n.21.

Because there is no split in the circuits, this case does not warrant the Court's review. Furthermore, this Court should give Congress the opportunity to address the policy issues presented by

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[26] The United States incorrectly broadens the *Akzo* court's holding to conclude that "CERCLA precludes imposition of 'independent state remedies' *once a CERCLA action is underway.*" Pet. at 19 (emphasis added). Rather, the court expressly limited its holding to circumstances where a final remedy has been selected and a consent decree lodged with the court. 949 F.2d at 1455, 1456.

this case prior to review by this Court.

III. BECAUSE CONGRESS IS RECONSIDERING CERCLA THIS TERM, REVIEW BY THIS COURT IS NOT WARRANTED IN THIS CASE.

The United States' argument that independent state authority would result in chaos at CERCLA sites is directed to the wrong forum. CERCLA is to be reauthorized during this congressional term. If the United States can present a compelling policy argument that CERCLA should preclude state law at cleanup sites, it should address its concerns to Congress.[27]

Congress clearly intended that CERCLA co-exist with state environmental laws, rather than preclude them. The United States urges this Court to override Congress' clear choice, preclude states from exercising their historic police powers, and leave the sole regulation of federal facility cleanups to the federal polluter. This Court should decline to engage in such an exercise of judicial legislation. Indeed, this Court has admonished petitioners to seek relief from results which they believe Congress could not have intended "from the law making authority, and not [from] the courts." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). *See also Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575-76 (1982) ("The remedy for any dissatisfaction with the results in particular cases lies

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[27] It appears that during reauthorization Congress will address the role of the states at CERCLA sites. An assistant EPA administrator recently testified before Congress that EPA is considering recommending legislative changes to increase state authority at CERCLA sites, including proposing that CERCLA programs be delegated to the states. *Greater State Role, National Standards Advocated by EPA, Agency Official Testifies*, 24 Env't Rep. (BNA) 1229 (Nov. 5, 1993).

with Congress and not with this Court. Congress may amend the statute; we may not.").

CONCLUSION

The United States depicts a simplistic and inaccurate view of the issues in this case: that Congress intended the ARARs scheme to constitute the sole role of state law at CERCLA sites. Rather, as the lengthy court of appeals decision demonstrates, this is a complicated regulatory area involving the interplay between two very technical statutes, both of which are before Congress for reauthorization. Review of the case by this Court would be a needless expenditure of judicial resources.

Thus, the petition for writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX A

STATUTORY PROVISIONS INVOLVED

Section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9606 provides:

§ 9606. Abatement actions [CERCLA § 106]

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

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Sections 3004, 3008 and 6001 of the Resource Conservation and Recovery Act, 42 U.S.C. 6923 *et seq.*, provide in part:

§ 6923. Standards applicable to transporters of hazardous waste [RCRA § 3003]

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(u) Continuing releases at permitted facilities

Standards promulgated under this section shall require, and a permit issued after November 8, 1984, by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit. Permits issued under section 6925 of this title shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.

(v) Corrective action beyond facility boundary

As promptly as practicable after November 8, 1984, the Administrator shall amend the standards under this section regarding corrective action required at facilities for the treatment, storage, or disposal, of hazardous waste listed or identified under section 6921 of this title to require that corrective action be taken beyond the facility boundary where necessary to protect human health and the environment unless the owner or operator of the facility concerned demonstrates to the satisfaction of the Administrator that, despite the owner or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action. Such regulations shall take effect immediately upon promulgation, notwithstanding section 6930(b) of this title, and shall apply to--

(1) all facilities operating under permits issued under subsection (c) of this section, and

(2) all landfills, surface impoundments, and waste pile units (including any new units, replacements of existing units, or lateral expansions of existing units) which receive hazardous waste after July 26, 1982.

Pending promulgation of such regulations, the Administrator shall issue corrective action orders for facilities referred to in paragraphs (1) and (2), on a case-by-case basis, consistent with the purposes of this subsection.

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§ 6928. Federal enforcement [RCRA § 3008]

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(h) Interim status corrective action

(1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.

(2) Any order issued under this subsection may include a suspension or revocation of authorization to operate under section 6925(e) of this title, shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a time for compliance. If any person named in an order fails to comply with the order, the Administrator may assess, and such person shall be liable to the United States for, a civil penalty in an amount not to exceed $25,000 for each day of noncompliance with the order.

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§ 6961. Application of Federal, State, and local law to Federal facilities [RCRA § 6001]

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

APPENDIX B

STATE OF COLORADO, Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE ARMY, Defendant.

Civ. A. No. 86-C-2524.

United States District Court,
D. Colorado.

Feb. 24, 1989.

MEMORANDUM OPINION AND ORDER

CARRIGAN, District Judge.

Plaintiff, State of Colorado, commenced this action against the defendant, United States Department of the Army ("the Army") in the District Court for the City and County of Denver, Colorado, seeking an injunction to halt alleged present and future violations of certain Colorado statutes and regulations concerning hazardous waste management and control. The Army removed the case to this court.

The area giving rise to the lawsuit is known as "Basin F." It is a hazardous waste disposal pond situated within the Rocky Mountain Arsenal ("the Arsenal"). The arsenal is a federally controlled site occupying about 27 square miles near Commerce City, a suburban area northeast of Denver, Colorado. The Arsenal was constructed in 1942 to manufacture and assemble chemical warfare agents, chemical products and incendiary munitions. It also has been

used for detoxification and disposal of these toxic materials. Portions of the Arsenal have been leased to private operators, including Shell Oil Company ("Shell") for the manufacture of pesticides and herbicides. The United States owns and the Army operates the Arsenal. (Shell is a defendant in a companion CERCLA case, No. 83-C-2379. These two cases have been consolidated with a third, 83-C-2386.)

The Army constructed Basin F in 1956 to store and dispose of contaminated liquid wastes generated by the Army's and Shell's chemical manufacturing and processing activities. Basin F began receiving contaminated liquid wastes in October 1956.

As originally filed in the state court, the instant action concerns solely Basin F. The State's complaint asserted numerous claims against the Army based on Colorado's Ground Water Monitoring Regulations [Colorado Hazardous Waste Regulations, 6 CCR 1007-3, ("Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities, 6 CCR 1007-3, Part 265, Subpart F), issued pursuant to the Colorado Hazardous Waste Management Act ("the CHWMA"), Title 25-15, part 3, C.R.S. (1982)]. These claims include: (1) failure to provide and monitor complying upgradient monitoring wells, in violation of § 265.91(a)(1) (First Claim); (2) failure to submit a specific ground water monitoring program, in violation of § 265.93(d)(2) (Second Claim); (3) failure to determine impact of Basin F on ground water quality, in violation of 6 CCR 1007-3, § 265.93(d)(2) (Third Claim); and (4) failure adequately to monitor and report ground water quality assessment, in violation of §§ 265.93(d)(5) and (7). The Army subsequently removed the action to this court.

On January 14, 1987, the Army filed a motion to dismiss or, in the alternative, for summary judgment or partial summary judgment, regarding the claims set forth in the plaintiff's complaint. The issues raised in the motion were fully briefed by the parties.

On December 4, 1987, the plaintiff filed its First Amended Complaint setting forth new claims and allegations. The First Amended Complaint alleges that in June, 1983, the Army submitted to the United States Environmental Protection Agency ("E.P.A") a plan to close Basin F. It further alleges that, subsequent to E.P.A.'s authorization to the State of Colorado to operate the State's hazardous waste management program, the Colorado Department of Health ("CDH") issued a final plan to close Basin F, pursuant to State Closure Regulations (6 CCR 1007-3, Part 265, Subpart G). The Basin F Closure Plan ("the Plan") became effective October 2, 1986, as a final order of the CDH. Defendant did not appeal, or otherwise seek review of the Plan. Pursuant to the Plan's terms, it is alleged, the Army was required to complete certain remedial steps effecting Basin F's closure by October 2, 1987.

In the First Amended Complaint, the plaintiff asserts claims against the Army for: (1) failure to close Basin F in compliance with the Basin F Closure Plan (First Claim); (2) failure to comply with Colorado's Ground Water Monitoring Regulations, a claim with three subclaims, and essentially a reassertion of three of the claims set forth in the plaintiff's initial complaint (Second Claim); and (3) failure to pay annual operating and waste volume fees, in violation of §§ 100.31(a) and (b) of State Fee Regulations, 6 CCR 1007-3, Part 100.

Plaintiff asserts that the Attorney General of the State of Colorado has standing and authority to prosecute this suit, pursuant to Executive Order No. D0012-86, issued February 4, 1986, under C.R.S. § 24-31-101(1)(a) (1982). The State Attorney General filed this action at the request of the CDH pursuant to C.R.S. §§ 24-4-106(3) and 25-15-308(2) (1982) seeking to halt present violations and prevent future violations of the CHWMA, as well as the Colorado Hazardous Waste Regulations, and to enforce the final order issued by CDH to close "Basin F." Plaintiff further asserts that this action is properly filed against the Army as defendant because Congress has waived sovereign immunity as to civil actions against federal entities

to enforce state requirements regarding hazardous waste management and disposal. For this proposition the State cites § 6001 of the Solid Waste Disposal Act, as amended by the Resource Conservation Act of 1976 ("RCRA") [42 U.S.C. §§ 6901-6987], 42 U.S.C. § 6961.

The Army has moved to dismiss the plaintiff's First Amended Complaint, asserting that the United States has not waived its sovereign immunity as to these claims under RCRA § 6001, [42 U.S.C. § 6961]. Defendant Army's argument in part emphasizes that I presently have pending before me two actions directed at cleanup of the Arsenal as a whole. As stated above, these consolidated cases are *State of Colorado v. United States*, Civil Action No. 83-2386, and *United States v. Shell Oil Company*, Civil Action No. 83-C-2379. Both cases were filed under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.* CERCLA was amended by the 1986 Superfund Amendments and Reauthorization Act ("SARA"), Pub.L. 99-499, 100 Stat. 1615.

Defendant Army does not dispute that RCRA § 6001 [42 U.S.C. § 6961], read in conjunction with RCRA § 7002 [42 U.S.C. § 6972], contains a waiver of federal sovereign immunity. Rather, the Army asserts that sovereign immunity is not waived under those sections when there is an ongoing CERCLA cleanup action at the site that addresses hazardous waste requirements that are the same in substance as those sought to be enforced by the state under RCRA. In essence, the Army argues that CERCLA's enforcement and response provisions pre-empt and preclude a state RCRA enforcement action with respect to the cleanup of hazardous wastes at the Arsenal.

Plaintiff State has responded by opposing the motion. Initially, I deny as moot the Army's first dispositive motion addressing the State's complaint, except for that portion of the defendant's argument that is reasserted in its second motion to dismiss.

At a hearing on the plaintiff's motion for injunctive relief, I briefly heard oral argument on the defendant's dismissal motion. More recently, the State has reasserted its position by moving for partial summary judgment, and the Army has filed an opposition memorandum to that motion. In addition, the parties have filed supplemental briefs at the court's request addressing whether the State is precluded from pursuing this action because the Army has commenced interim cleanup measures at Basin F; whether and to what extent the State will have a role in the Arsenal clean up if the instant action is dismissed; and whether the State is proceeding under RCRA § 7002, [42 U.S.C. § 6972] in this case. The parties also have filed briefs on whether the State's action is barred by the Supremacy Clause.

The issues thus have been fully briefed and orally presented by the parties. The matter is ripe for decision.

It is fundamental that the Untied States cannot be sued without its consent, and this immunity protects federal agencies such as the Army. In the absence of an express statutory waiver of immunity, an action against the United States must be dismissed for lack of jurisdiction. *United States v. Shaw*, 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888 (1940); *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). A waiver of immunity must be strictly construed and must be confined to the terms and conditions specified. *Stubbs v. United States*, 620 F.2d 775 (10th Cir.1980); *Reynolds v. United States*, 643 F.2d 707 (10th Cir.1981).

Section 6001 of RCRA, [42 U.S.C. § 6961], provides in pertinent part:

> "*Each department, agency*, and instrumentality *of the executive*, legislative and judicial *branches of the Federal Government* ... engaged in any activity resulting, or which may result, in the disposal or management of solid or hazardous waste *shall comply*

with all Federal, *State*, interstate, and local *requirements*, both substantive and procedural (including any requirements for permits or reporting *or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief*), *respecting* control and abatement of solid waste or *hazardous waste disposal* in *the same manner*, and to the same extent, *as any person* is subject to such requirements, including the payment of reasonable service charges. *Neither* the *United States, nor any agent, employee, or officer* thereof, *shall be immune or exempt from any process or sanction of any State enforcement* of any *such injunctive relief* ...." 42 U.S.C. § 6961. (Emphasis added).

Relevant portions of RCRA § 7002, [42 U.S.C. § 6972] provide as follows:

"(a) In general.

... [A]ny person may commence a civil action on his own behalf--(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, or order which has become effective pursuant to this Act [42 U.S.C. §§ 6901 et seq.]...."

* * * * * *

"(b) Actions prohibited.

* * * * * *

(2)(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment--

> (i) has commenced and is diligently prosecuting an action under section 7003 of this Act [42 U.S.C. § 6973] or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C § 9606],
>
> (ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C. § 9604];
>
> (iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C. 9604] and is diligently proceeding with a remedial action under that Act; or
>
> (iv) has obtained a court order (including consent decree) or issued an administrative order under section

> 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, or section 7003 of this Act [42 U.S.C. §§ 9606, 6973] pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action."

The term "person" who is authorized to commence such an action is defined elsewhere to include the State. 42 U.S.C. § 6903(15).

The Army stresses that these sections must be reconciled with certain CERCLA provisions that govern the manner in which federal agencies must undertake CERCLA cleanup actions and which specify the state role in those cleanup efforts. Defendant cites RCRA § 1006, [42 U.S.C. § 6905], in support of its argument that Congress intended that RCRA and CERCLA be integrated to avoid conflicts and to eliminate cleanup duplication. RCRA § 1006, [42 U.S.C. § 6905], states in relevant part:

> "(a) Nothing in this Act [42 U.S.C. §§ 6901 et seq.] shall be construed to apply (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act ..., the Safe Drinking Water Act ..., the Marine Protection, Research and Sanctuaries Act of 1972 ..., or the Atomic Energy Act of 1954 ..., except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts."
>
> "(b)(1) The [EPA] Administrator shall integrate all provisions of this Act [42 U.S.C. §§ 6901 et seq.]

> for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of the Clean Air Act ..., the Federal Water Pollution Control Act ..., the Federal Insecticide, Fungicide, and Rodenticide Act ..., the Safe Drinking Water Act ..., the Marine Protection, Research and Sanctuaries Act of 1972 ..., and such other Acts of Congress as grant regulatory authority to the Administrator. Such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed in this Act ... and in the other acts referred to in this subsection."

RCRA §§ 1006(a) and (b), [42 U.S.C. § 6905(a) and (b)], were enacted as part of the 1976 RCRA amendments to the Solid Waste Disposal Act. The Army asserts that RCRA §§ 1006(a) and (b) do not specifically mention CERCLA because CERCLA was not enacted until 1980. However, the Army does not explain why there has been no amendment to include CERCLA in the list during the intervening eight years.

The issue before me thus concerns whether the provisions of RCRA and CERCLA can be harmoniously construed so as to permit the State to pursue a RCRA suit against the Army seeking enforcement of state hazardous waste cleanup and abatement laws at Basin F at the same time as other pending actions instituted under CERCLA are addressing the entire Arsenal cleanup. It is undisputed that the plaintiff's action here seeks to enforce, against the Army, *state* hazardous waste management laws and regulations (the CHWMA and regulations promulgated thereunder) administered "*in lieu of*" the federal RCRA program to the extent that the State has been so authorized by the E.P.A. 42 U.S.C. § 6926(b).

At a recent hearing, the State asserted that Basin F, and perhaps other areas within the Arsenal, are RCRA units. On the

other hand, the Army contends that the entire Arsenal constitutes an on-going CERCLA cleanup site, and that the E.P.A. is the primary enforcement authority. Basin F still has not been placed on the National Priorities List ("the NPL"), although the Army for years has been assuring this court that it would be so designated. Nevertheless, after much fine-tuning, the main point of the Army's argument is that permitting the State to "carve out" Basin F and proceed under RCRA, separate and apart from the Army's CERCLA cleanup anticipated for the Arsenal as a whole, will defeat CERCLA's aims and frustrate its purpose.

The matter has been further complicated because (1) the Army has not completed a CERCLA Remedial Investigation and Feasibility Study for Basin F, or even for the Arsenal, and the Record of Decision is not expected to be completed until 1993; (2) the Army projected to the State, pursuant to RCRA, that Basin F would be cleaned up and closed by October 1987; and (3) in March 1988, the Army commenced implementing certain "interim response" cleanup measures at Basin F and certain cleanup actions are substantially completed and still underway.

In *United States v. Shell Oil Co.*, 605 F.Supp. 1064 (D.Colo.1985), this court discussed in some detail the overriding purposes for which RCRA and CERCLA were enacted and the goals sought to be accomplished by each statutory scheme. As indicated there, RCRA was enacted to close the regulatory gap that existed because pre-RCRA federal environmental laws did not effectively regulate the disposal of environmental pollutants, including solid and hazardous wastes, on land. That opinion stated:

> "RCRA provides for the promulgation of regulations by the [USEPA] applicable to generators of hazardous waste, transporters of hazardous waste, and owners and operators of hazardous waste treatment, storage and disposal facilities. The regulations established requirements respecting,

> among other things, record keeping practices, labeling practices, use of appropriate containers, use of a manifest system, and the design, construction, operation and maintenance of facilities." *Id.* at 1070.

In *Shell, supra*, I cited a Congressional Report [H.R.Rep. No. 96-1016, 96th Cong., 2d Sess. 22, *reprinted in* 1980 U.S.Code Cong. & Ad.News 6119, 6125] declaring that RCRA was enacted as a prospective "cradle-to-grave" regulatory regime that applies to past sites only to the extent that they are posing an imminent hazard. *Id.*

CERCLA was enacted to clean up inactive hazardous waste disposal sites. It established "'a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.'" *Id.* at 1071. CERCLA was enacted to fill the regulatory gap left open by existing law. I further stated in *Shell*:

> "[W]hile pre-CERCLA law could prevent further pollution from the contemporary generation and disposal of hazardous wastes, it could not effectively abate the ongoing environmental deterioration resulting from wastes which had been dumped in the past. CERCLA was enacted to address this problem. It is by its very nature backward looking. Many of the human acts that have caused the pollution already had taken place before its enactment; physical and chemical processes are at their pernicious work, carrying destructive forces into the future."
>
> "The decision was made in CERCLA to clean up these inactive hazardous waste sites...." *Id.* at 1072.

Defendant sets forth several policy arguments in support of

its contention that CERCLA enforcement and remediation should be given exclusive jurisdiction and preclude RCRA enforcement through the present action. Included in the Army's broad policy arguments are the general assertions (1) that the court should give precedence to CERCLA because it is the more recent, specific statutory scheme for cleaning up hazardous waste contamination at federal facilities; (2) that enforcement under RCRA would disrupt the ongoing cleanup at the Arsenal and would impermissibly duplicate the CERCLA cleanup activities; and (3) that State RCRA enforcement would undermine the goals and policies that Congress set forth in CERCLA. Defendant cites various CERCLA provisions in support of these broad policy arguments.

For example, the State's closure plan and monitoring requirements are effectuated through a state permit process. In contrast, CERCLA § 121(e)(1), [42 U.S.C. § 9621(e)(1)], exempts CERCLA sites from having to acquire state or federal permits for remedial action conducted on site. Thus, the Army contends, the delays incurred in obtaining permits for RCRA enforcement would frustrate Congress's intent in enacting CERCLA as an effort to "speed up" the cleanup process. (I note that the instant CERCLA action has been pending since December 1983, and despite the court's frequent cajoling, the parties have constantly delayed efforts to bring the case to trial; nor have they proposed an overall plan for clean up as contemplated by CERCLA).

The Army further argues that the State's interest in having its administrative requirements satisfied with respect to Basin F are protected. In support of this argument, the Army relies on CERCLA § 121(d), [42 U.S.C. § 9621(d)], which provides that a State's environmental standards, including state RCRA requirements, shall be considered in determining the level of cleanup at a CERCLA site and will be applied to the extent that they are applicable, relevant and appropriate ("ARAR"). At nearly every hearing, however, the State has complained that it is being left out of the process and by-passed in decisions made by the Army and the EPA.

Next, the Army asserts, the Arsenal has been listed on the National Priorities List ("the NPL"), and Basin F has been proposed for listing and should be placed on the NPL "early in 1988." It is now February 1989. Pursuant to CERCLA § 120, [42 U.S.C. § 9620], the Army argues, the E.P.A., not the State of Colorado, is ultimately responsible for overseeing and approving all Arsenal cleanup activities. However, neither party has advised the court that Basin F has been listed on the NPL.

The Army contends that it began its CERCLA Remedial Investigation and Feasibility Study at the Arsenal in October 1984. The interim remedial action plan for Basin F was proposed in June 1986 and transmitted to the State on December 4, 1987. The Army's brief also outlines the interim response actions taken with respect to the Arsenal and Basin F. Defendant Army argues that the cleanup of the Arsenal and Basin F are "inextricably related."

Last, argues the Army, once a CERCLA cleanup is underway, the State's participation rights are defined and governed by CERCLA. CERCLA § 120(f), [42 U.S.C. § 9620(f)], affords the State the opportunity to participate in the planning and selection of remedial action. CERCLA § 121(f), [42 U.S.C. § 9621(f)], outlines the State's right to participate in the cleanup remedy selection process and to seek review of the remedy selected. As indicated above, pursuant to CERCLA § 121(d) and (e)(2), [42 U.S.C. §§ 9621 (d) and (e)(2)], the State may seek compliance with its own standards, such as permit requirements or other administrative requirements, if it is concerned that the CERCLA cleanup will not ensure adequate protection. The statute sets forth procedure the State can utilize to challenge judicially the United States' remedial action plan prior to its implementation. CERCLA § 121(f)(3)(B), [42 U.S.C. § 9621(f)(3)(B)].

Similarly, CERCLA §§ 117, [42 U.S.C. § 9617)], and 113(k), [42 U.S.C. § 9613(k)], provide for public participation in the cleanup process by providing an opportunity for the public to submit

written and oral comments, and to have a public meeting near the facility. RCRA, in contrast, does not provide for formal public participation.

In assessing the defendant's arguments, I first must examine other relevant CERCLA provisions.

> CERCLA § 114(a), [42 U.S.C. § 9614(a)], states:
>
> "(a) Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."

Additionally, CERCLA § 302(d), [42 U.S.C. § 9652(d)], provides in pertinent part:

> "(d) Nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants...."

Even more explicitly, CERCLA § 120, part of SARA, [42 U.S.C. § 9620] states in pertinent part:

> "(a)(1) Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act [42 U.S.C. § 9607]. Nothing in this section shall be construed to affect the liability of any person or

entity under sections 106 and 107 [42 U.S.C. §§ 9606 and 9607]."

* * * * * *

"(a)(4) State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities *are not included* on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency or instrumentality." (Emphasis added).

* * * * * *

"(i) Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act [42 U.S.C. §§ 6901 et seq.] (including corrective action requirements)."

Tenets of statutory construction provide that whenever a legislative body enacts a statute, it has in mind previous statutes relating to the same subject matter. The new provision is presumed to be in accord with the legislative policy embodied in prior statutes and all statutes should be construed together. 2A *Sutherland Statutory Construction* § 51.02 (Sands 4th ed.). As I emphasized in *Shell*, "... CERCLA must be construed in light of previous statutes relating to environmental pollution, ...," and notably, that includes RCRA. *Shell*, 605 F.Supp. at 1070.

Nothing in the cited statutes indicates that a CERCLA action should take precedence over a RCRA enforcement action. On the contrary, it appears that CERCLA was intended to operate independently of and in addition to RCRA, and that the statutory schemes are not mutually exclusive. *See Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F.Supp. 1049 (D.Ariz.1984) *aff'd* 804 F.2d 1454 (9th Cir.1986).

In fact, CERCLA § 120(a)(4), [42 U.S.C. § 9620(a)(4)], preserves state enforcement actions at federal facilities that are not listed on the National Priorities List. CERCLA § 120(i), [42 U.S.C. 9620(i)], requires the federal government to comply with the Solid Waste Disposal Act, and now RCRA, whether or not the facility is listed on the NPL. It is undisputed that Basin F is not listed on the NPL.

I realize that CERCLA was enacted after RCRA. However, I cannot read a conflict into statutes enacted on the same subject matter where none exists. Nor can I supply an amendment to a statute that Congress has chosen not to amend for over eight years.

The Army was one of the active polluters at Basin F. The Army thus is jointly and severally liable for the contamination at Basin F and its alleged harmful impact on the community that borders the Arsenal. Were I to dismiss this action, the Army's cleanup efforts would go unchecked by any parties whose interest are in any real sense adverse to those of the Army. The same Justice Department attorneys have repeatedly claimed to represent both the Army and the E.P.A. in this action, even though the Army is a defendant and the E.P.A. acts for the United States as a plaintiff. These Justice Department lawyers repeatedly have rejected this court's suggestions that representing these opposing parties constitutes a conflict of interest.

Since it is the E.P.A.'s job to achieve a clean up as quickly and thoroughly as possible, and since the Army's obvious financial

interest is to spend as little money and effort as possible on the cleanup, I cannot imagine how one attorney can vigorously and wholeheartedly advocate both positions. For this reason, among others, I have been reluctant to approve the proposed "consent decree," which is fundamentally an agreement between the two polluters, the Army and Shell, to restrict future uses of Arsenal land and thereby limit cleanup standards, thus lowering costs for both defendants.

The Army, in effect, seeks full and unbridled discretion, subject only to E.P.A.'s input through the same attorneys who represent the Army, to regulate the Basin F cleanup, a process that has been ongoing for more than five years and is still nowhere near completion or resolution. CERCLA was enacted to "speed up" the cleanup process, not delay it.

Moreover, once the Army has satisfied what it considers to be its cleanup obligations, the State is responsible to its citizens if the process has not been thorough. Having the State actively involved as a party would guarantee the salutary effect of a truly adversary proceeding that would be more likely, in the long run, to achieve a thorough cleanup.

Sites like the Arsenal, and especially Basin F, must be considered in the long range perspective of generations yet unborn and centuries still far over time's horizon. Indeed, if the instant CERCLA action fails to achieve an adequate cleanup, it is the people of Colorado who ultimately must pay either the price of cleanup, or the price of not cleaning up this, the worst hazardous and toxic waste site in America. It is not inappropriate that the present and future victims of this poison legacy, left in their midst by the Army and Shell, should have a meaningful voice in its cleanup. In RCRA, Congress has plainly provided them that voice through representation by the State. I hold that RCRA enforcement by the State is not precluded by CERCLA in the circumstances here presented.

I conclude that the E.P.A.'s potential monitoring of the Army's Basin F cleanup operation under CERCLA does not serve as an appropriate or effective check on the Army's efforts. As long as both of these federal agencies are represented in the Arsenal CERCLA actions by the same Justice Department lawyers who have professed that they have no conflict of interest, even though one of their clients is a plaintiff and another a defendant in the same consolidated action, there is no vigorous independent advocate for the public interest.

As an additional argument, the defendant asserts that the instant action is barred by sovereign immunity because the state regulatory standards sought to be applied are not precise or objective, and are ill-suited for uniform application. Defendant contends that RCRA § 6001, [42 U.S.C. § 6961], must be strictly construed and does not extend to circumstances in which the state has failed to promulgate objective and ascertainable regulations by which federal compliance can be fairly gauged. In support, the defendant cites *State of Fla. Dept. of Environmental Regulation v. Silvex Corp.*, 606 F.Supp. 159 (M.D.Fla.1985) and *Kelly v. United States*, 618 F.Supp. 1103 (W.D.Mich.1985).

In *Silvex*, the State of Florida sued the United States Navy, among other defendants, asserting a claim for negligently releasing hazardous waste materials in violation of certain state statutes that permitted the State to take emergency action when the spillage of hazardous waste material posed an imminent threat to public health, safety and welfare. Florida contended that the Navy had consented to be sued under RCRA § 6001, [42 U.S.C. § 6961]. The Navy moved for dismissal on the ground that the state statutes sought to be enforced were not "requirements" as envisioned by Congress in RCRA § 6001, [42 U.S.C. § 6961]. The Army's argument in the instant case tracks the Navy's argument in the *Silvex* case.

In her analysis of the issue, Judge Black reviewed RCRA's legislative history and similar sovereign immunity waiver provisions

contained in analogous federal environmental laws. The district court's opinion stated, in pertinent part:

> "A legislative report discussing the pre-RCRA bill then before the Senate indicates the RCRA was intended to force federal agencies dealing with hazardous waste '*to comply with State and local controls* on solid waste and hazardous waste disposal as if they were private citizens.' This includes compliance with all substantive and procedural requirements, '*and specifically any requirements to obtain permits*.' Senate Report No. 94-988, 70th Cong., 2nd Session, at 24 (1976); 122 Cong.Rec. 32,631 (Sept. 27, 1976). The requirements referred to in the Senate report are more in the nature of regulatory guidelines and ascertainable standards that a federal agency dealing with hazardous waste would have to meet."
>
> "Senate Report No. 94-988 further states that section 6961 parallels the waiver provision of the Clean Air Act, 42 U.S.C. § 7418, and the Federal Water Pollution Control Act, 33 U.S.C. § 1323.... The legislative history of these provisions demonstrates a similar intent to have requirements defined as objective state standards of control...."
>
> "The courts interpreting requirements as used in federal environmental legislation have also limited the term to a state's regulatory requirements. Courts reviewing the waiver provisions of the Clean Air Act, the FWPA [Federal Water Pollution Act], and the Noise Control Act, 42 U.S.C. § 4903(b), the language of which, ..., directly parallels section 6961, consistently have held that requirements is a limited term which cannot be expanded to include the

kinds of state law liability provisions that the [State] relies on in this case...." (citations omitted).

* * * * * *

"... To achieve uniformity and consistency in state environmental regulation, sovereign immunity is partially waived to require federal entities to comply with state standards. This narrow intrusion into federal sovereign immunity has required that courts strictly define requirements as objective and ascertainable state regulations; e.g., state pollution standards or limitations, compliance schedules, emissions standards, and control requirements...." (citations omitted). *Id.* at 162-163.

The district court concluded that RCRA's legislative history and certain analogous federal statutes containing similar immunity waiver provisions have strictly defined "requirements" as synonymous with state objective regulations. Florida's action against the Navy was dismissed because the state statutes failed to set forth the specific, precise standards intended by the term "requirements" contained in RCRA § 6001, [42 U.S.C. § 6961].

The case of *Kelly v. United States, supra*, is similar. There the district court considered the waiver provision contained in the Federal Water Pollution Control Act, 33 U.S.C. § 1323(a), in the context of state claims under Michigan's water and environmental laws being asserted against a federal agency. The court dismissed the state claims because the state statutes did not provide "objective, quantifiable standards subject to uniform application." *Kelly*, 618 F.Supp. at 1108.

I have set forth in an appendix to this order the pertinent state regulations that apply to this action, including the regulations the Army has allegedly violated. As emphasized by the State in its brief,

these regulations track, almost verbatim, the federal regulations promulgated by E.P.A., pursuant to RCRA, that already apply to all federal agencies. *Compare* 6 CCR 1007-3, Subpart F, §§ 265.90 through 265.94 with 40 C.F.R. Part 265, Subpart F, §§ 265.90 through 265.94. Based on my review of these state regulations, I find and conclude that they set forth sufficiently specific and precise standards, subject to uniform application, to satisfy the term "requirements" as used in RCRA § 6001, [42 U.S.C. § 6961].

As can be clearly seen, RCRA § 6001, [42 U.S.C. § 6961], is all-encompassing since it provides that federal facilities are subject to "all Federal, State, Interstate, and local requirements, both substantive and procedural...." Giving the words used their plain, ordinary meaning, it is difficult to imagine a clearer statement of legislative intent: federal facilities such as Basin F at the Rocky Mountain Arsenal are subject to state and local requirements respecting the treatment and disposal of hazardous waste provided that those state and local requirements set out specific and precise standards subject to uniform application. Having found that the Colorado regulations satisfy these standards, I conclude that the Army's motion to dismiss based on this argument must be denied.

Accordingly, it is ORDERED that the defendant's motion to dismiss the First Amended Complaint, or in the alternative for summary judgment or partial summary judgment, is denied.

The plaintiff State of Colorado is ORDERED to amend to update [sic] its pending Motion for Preliminary Injunction and Motion for Partial Summary Judgment within 11 days, if it desires to do so, and apply for an expedited hearing specifying which issues remain for decision.